No. 22202

United States Court of Appeals for the Ninth Circuit

ALBERT E. LEUTHOLD, Superintendent of Banks, State of Montana, Helena, Montana, SECURITY BANK and MINERS BANK OF MONTANA, N.A.,

Appellants,

-vs-

WILLIAM B. CAMP, Comptroller of the Currency,

Appellee.

THE FIRST NATIONAL BANK OF BUTTE and DALY NATIONAL BANK OF ANACONDA,

Appellee-Intervenors.

On Appeal from the United States District Court for the District of Montana

Appellants' Reply Brief

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Filed ...., 1968

...., Clerk

BILLINGS TIMES PRINT

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I.

REPLY TO ARGUMENTS IN APPELLEES' BRIEF

Appellees have raised points in their briefs which require specific reply. Since the main issues of the case fall into three categories:

1. Interpretation of Montana statutes in conjunction with Sec. 36(c) of the National Bank Act;
2. Interpretation of Sec. 36(b) of the National Bank Act; and
3. Interpretation of the Bank Holding Company Act

we shall reply to appellees' points under those headings. Appellees have made additional incidental arguments and we shall deal with them separately.

A. INTERPRETATION OF MONTANA STATUTES

1. Particular and General Words:

Intervenor-Appellees rely upon Sec. 93-401-16 R.C.M. 1947 and *Story Gold Dredging Co. v. Wilson,* 106 Mont. 166; 76 P.2d 73. The rule they advance is that in determining the intention of a legislature which has used inconsistent general and particular words, a particular intent will control a general intent when the provisions are inconsistent. Intervenor-Appellees then declare that Sec. 5-1124 providing for *offices* after con-

solidation, shows a particular intent to modify the general intent of Sec. 5-1028, prohibiting branch banking.

We agree. Under 5-1028 no banking facility of any kind could be maintained away from the premises of a bank. Sec. 5-1124 allowed *offices* after consolidation. The specific controls the general. But this rule is of no help in determining what the legislature intended *offices* to include, and that is the issue of this case. The citation of this rule in no way affects the application of the rule relied on by appellants that a legislature is presumed to be aware of statutes already on the books, and when it uses different language in a subsequent, kindred statute, it is presumed to have intended a different meaning.

2. Subsequent Action or Inaction by the Montana Legislature:

Both the Comptroller and Intervenors attempt to imply some legislative intent from the fact that a bill to repeal Sec. 5-1124 failed of passage in the 1967 Legislature. In support of this argument they cite statements made in legislative hearings by one of the appellants, Superintendent Leuthold.

The Supreme Court of Montana has rejected this argument on several occasions. In *Murray Hospital v. Angrove,* 92 Mont. 101, 106; 10 P.2d 577, 583 (1932) the Court held that the controlling intent was the intent

of the legislature that passed the law in question, not the intent of a subsequent legislature that failed to amend or repeal. In this connection the Court said:

> ". . . . It is the contemporaneous action and construction by the legislature to which we may resort in order to determine the intent of that body in enacting a law or rejecting an amendment thereto.
>
> "No case has been cited, or found, holding that the records and journals of subsequent sessions of the legislature have any probative value in determining the intent of the legislature in passing laws already on the statute books, or that the defeat of an attempted amendment to a law which has been on the books for 16 years throws any light on the intent of the assembly which enacted the law.
>
> "But even if the action of the Assembly of 1931 in refusing to amend the Act of 1915 is conceded to be a legislative expression entitled to consideration, the showing made does not disclose legislative 'interpretation' of Sec. 2907, necessarily in conflict with the opinion herein as written. . . . It may be that the attempt was made merely for the purpose of overcoming adverse rulings by the clarification of the Act, and it is as reasonable to assume that the House, in rejecting the amendment, determined that it was so 'plain, simple, direct and unambiguous' as to require no interpretation or clarification."

The case is squarely in point and has been followed in *Trudgen v. Trudgen,* 134 Mont. 174, 329 P.2d 225 (1958) and *Montana Power Co. v. Vigilante Electric Co-op,* 143 Mont. 119, 387 P.2d 718 (1963).

Bottomly v. Ford, 117 Mont. 160, 157 P.2d 108 (1945) and *James v. V.K.V. Lumber Co.,* 145 Mont.

466, 401 P.2d 282 (1965), cited by appellees, are not in point.

3. OFFICES — the Use of the Plural in Sec. 5-1124 as an Indication of Intent by the 1931 Legislature:

Appellees' argue (Comptroller's Br. 9; Intervenors' Br. 12) that Sec. 5-1124 provides for the operation of "'office*s*' at the 'location*s*' of the 'consolidat*ed* bank' ", and that "one such 'location' will, of course, be the main banking 'office' of any such consolidated bank." (Emphasis added) The flaw in this argument lies in the use of the words "consolidated bank" when the statute uses the words "consolidat*ing* banks". The distinction is significant, and appellees' argument exhibits an inexcusable misreading of the statute involving consolidation.[1]

To read Sec. 5-1124 correctly it is necessary to consider Sec. 5-1021, R.C.M. 1947, the consolidation statute which was in existence in 1931 as part of the banking code of 1927. This statute authorizes the consolidation of two or *more* banks. The resulting organization (or perhaps the bank doing the taking in — the statute is not clear) is designated in the statute as the "consolidat*ed* bank".

The bank, or banks, taken into the charter are designated in the statute as the "consolidat*ing* banks." When

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1 Sec. 5-1021, quoted at p. 6 of our original brief.

5-1124 came along four years later it provided that after consolidation, the consolidat*ed* bank (the one with the charter) can maintain "offices" (if more than one bank is consolidat*ing*, i.e., being taken in) in the location of the consolidating bank or banks.

Obviously the term "offices" in the plural has no reference to the consolidat*ed* bank; it only refers to the consolidating bank or banks.

4. *Leuthold Statement to 1967 Legislature:*

Both appellees devote considerable attention to Mr. Leuthold's statement to the 1967 Montana Legislative Committee. Despite its complete irrelevance to a determination of what the 1931 Legislature intended when it used the term "offices" in Sec. 5-1124,[2] they have seized upon it as though it were an admission against interest. They argue that because of Mr Leuthold's statement, and the 1967 Legislature's failure to repeal 5-1124 when he had endorsed repeal, a new legislative intent has been superimposed upon Sec. 5-1124: to-wit, that "office" means "branch bank".

As we have shown above, the correct rule in Montana is that action or inaction of a subsequent legislature has no bearing on the legislative intent of a previous

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2 Murray Hospital v. Angrove, supra.

legislature. Aside from that, appellees do not tell the whole story of what was before the legislative committee in 1967. House Bill 509 was opposed by lobbyists for intervenor-appellees, who filed a statement with the committee (Plaintiff's Exhibit 2). In this statement the legislators were urged to do nothing about the bill and "to let the banks settle their own lawsuits" and "if, in fact, they [appellants] have a valid, legal reason to oppose this consolidation in court, then the legislature has nothing to settle."

If the statements of Leuthold or intervenors' lobbyists have probative value in determining the legislative intent of the 1967 Legislature, it can be said with equal force that the Legislature decided to "let the courts decide" what was intended in 1931, or even that the combined statutes needed no clarification because they effectively prevented branch banking after consolidation.

5. Comptroller's Existing Offices Argument:

The Comptroller takes liberties with Sec. 5-1124 when he paraphrases the statute (Br. 9) as allowing "the consolidated bank to *continue* to 'maintain and operate' its *existing* 'offices' *in the places where they were operating before the consolidation*, i.e., 'in the locations of the consolidating banks'." (Emphasis added to the objectionable additions supplied by the Comptroller) If

offices were described in the statute as "existing" and if the statute allowed the consolidated bank to "continue" to maintain, and if the statute spelled out that the offices should be "in the places where they were operating before the consolidation," then the Comptroller might have an argument. But the statute obviously contains none of this material. The Comptroller creates the statute to his own liking and, having done so, he sprinkles his "existing offices" idea throughout his brief just as though it were valid (Br. 9, 10, 11, 14, 15).

B. INTERPRETATION OF SEC. 36(b), NATIONAL BANK ACT

1. General Aim of Competitive Equality by Congress Does Not Repeal or Amend Sec-36(b) or (c):

Appellee and Intervenors argue as to the effect of our admission of competitive equality (Appellees' Br. 8, Intervenors' Br. 24). We do admit that the general aim of Congress over the past 41 years has been competitive equality between national and state banks in the maintaining of branches. That aim was not attained in any one year. Complete equality has not yet been attained. In its move toward such equality, Congress has taken three different legislative steps.

Step 1. The McFadden Act of 1927. National Banks were authorized only to operate "inside" branches

in the municipalities in which the main banking facilities were situated (*First National Bank of Logan, Utah, v. Walker Bank & Trust Company,* 385 U.S. 252, 87 S.Ct. 492, 17 L.Ed 2d 348). Some state banks had a competitive advantage. They could maintain branches outside of such municipalities.

Step 2. The 1933 amendment to Section 36(c) permitted national banks to establish branches outside of the municipalities in which their main offices were located (*Walker Bank* case, supra), but some state banks still could retain branches in circumstances where national banks could not do so.

Step 3. In 1962 Section 36(b) was enacted. The Comptroller testified this amendment was intended to cover only a few technical situations in certain states (Appellants' Br. 32-34). The Montana Sec. 5-1124 is unique (Appellants' Br. 21). The 1962 amendment was not aimed at the Montana situation.

Step 4. This step has not yet been taken. Congress has not changed Section 36 to meet our unique Montana law. This Court must determine if Montana law allows a state bank in Anaconda to establish and operate a "new branch" in Butte. The maintenance of an existing bank under Sec. 5-1124 is not the equivalent of the establishment and operation of a *new* branch.

2. *Plain Language of Section 36(b):*

Intervenors argue that the Butte bank never has been a branch and so should be classed as a "new" branch of the resulting bank (Intervenors' Br. 23). That ignores the plain wording of the statute. Section 36(b) provides a resulting bank may *"retain and operate"* the Butte bank as a branch only if it might be *"established"* as a new branch under Section 36(c). From 1933 to the present, Section 36(c) has set the standards under which a national bank may *"establish and operate new branches."*

If the newness of the branch to the resulting bank were the test, then the 1962 amendment was unnecessary as to the main office or branches of banks participating in any consolidation. Such main office or branches all would be "new" to the resulting bank, even though they were existing facilities which were being retained rather than established as new branches. Newness is not the test. *The test is whether Montana law allows the establishment and operation of a new branch in the absence of consolidation.*

3. *Presentation to the Trial Court:*

Intervenors argue that this Court should not consider Section 36(b) because the theory was not presented to the trial court (Intervenors' Br. 27). That is inaccurate. The theory is set forth in Appellants' Com-

plaint by pleading of the statutes in question (Section I of Appellants' Complaint states that the action arises under 12 U.S.C., Sec. 36; and paragraph 10 of Section V quotes Sections 36(b) and (c) at length. Paragraph 14 of Section VI of the Complaint further sets forth the contentions with regard to Section 36). The quotations on this theory in Appellants' Brief are from sources of which this Court takes judicial notice. Clearly all parties had knowledge of this theory of Appellants' case.

4. Appellees' Inconsistency:

Appellees assert the need to apply the philosophy of competitive equality to evade a literal reading of Sec. 36(b). Later in their brief they ignore the philosophy of the Bank Holding Company Act to limit concentration of banking power, and *insist* on a literal reading of Sec. 3(a) of that act.

C. INTERPRETATION OF BANK HOLDING COMPANY ACT

1. South Dakota Cases:

Appellees attempt to defend against the declared and evident intent of the Congress to prohibit the expansion of bank holding companies across state lines by relying upon the South Dakota cases.[3]

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3 State of South Dakota v. National Bank of South Dakota, 219 F. Supp. 842 (D.S.D. 1963) 335 F2d 444 (8th Cir. 1964).

Strictly speaking, the courts in *South Dakota* held only that the State of South Dakota had no standing to attack the acquisition of a bank by a bank holding company subsidiary bank. It is true that after deciding the case on the narrow ground of standing to sue, both the District Court and the Court of Appeals undertook to interpret the Bank Holding Company Act.

Appellants of course disagree with *South Dakota,* both on its decision as to standing and on its interpretation of the Bank Holding Company Act. It will serve no purpose here to reassert at length the arguments of our original brief as to legislative history, congressional intent and piercing the corporate veil. All of these matters were before the Court in *South Dakota.*

However, there is nothing sacrosanct about a decision by a court of appeals of another circuit. The District Court in the case at bar declined to follow *South Dakota* on the standing to sue question, holding (R. 57) that the action of the Comptroller was properly reviewable in a suit by the Montana Superintendent of Banks and by aggrieved competitiors. Nor did the District Court in the case at bar follow *South Dakota's* observations on the exclusivity of the criminal remedy (R. 57). Both of these questions were involved in the basic "threshold issue" of *South Dakota.* Appellants suggest that *South Dakota* might just as well be in error on non-

threshold issues, as to which its observations are only dicta.

The Comptroller suggests that *South Dakota* is authority here, notwithstanding the fact that the Comptroller was not a party in *South Dakota* (Br. 18, fn. 11). But is that so? Banks are commercial enterprises and cannot be strictly judged for taking advantage of possible inconsistencies in a statute. The Comptroller, on the other hand, is a public official with the duty of proper interpretation of the banking laws. He is charged with a duty not to act arbitrarily or capriciously. Appellants submit that when the Comptroller approves a consolidation contrary to the manifest intent of Congress he is acting arbitrarily and capriciously.

D. ADDITIONAL ARGUMENTS

1. Appendix Material in Appellants' Original Brief:

This case was presented to the District Court on cross-motions for summary judgment and motions to dismiss. The only trial was on the question of jurisdictional amount and damages. The material in the appendices of Appellants' Brief is material of which an appellate court can properly take judicial notice.[4]

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4 **N.L.R.B. v. Atkins, 331 U.S. 398, 406; 67 S.Ct. 1265; Tucker v. Texas, 326 U.S. 517, 519; 66 S.Ct. 274.**

2. Failure to Appeal from Nunc Pro Tunc Order:

Rule 58 FRCP, requires the Clerk of the District Court to prepare a Judgment in a case such as this. The Clerk in this case failed to do so. Immediately upon the Court's decision in the matter Appellants filed Notice of Appeal. A considerable time thereafter the District Court, with this Court's concurrence filed a Judgment Nunc Pro Tunc. In the period between the filing of Notice of Appeal and the Nunc Pro Tunc Judgment, Appellants had before this Court a Motion for Injunction Pending Appeal, and no point was made by Appellees that no proper appeal had been filed. Appellee-Comptroller sought and was granted, with Appellant's consent, additional time to file his brief.

The District Court's order for entry of Nunc Pro Tunc Judgment specifically referred to the premature appeal and the possible necessity of validating it by means of a judgment entered nunc pro tunc. This Court, by Judges Hamley, Merrill and Koelsch, specifically approved the District Court's order to enter judgment as of a date prior to the Notice of Appeal.[5]

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5 See **Carter v. Campbell**, 285 F.2d 68 (1960) 5th Circuit, a case in which an appeal from an opinion was allowed, on the acquiescence of appellee and without a Nunc Pro Tunc Judgment.

3. *Intervenor-Appellees' Proposed Exhibits C and D:*

Proposed Exhibits C and D are newspaper accounts concerning the statement of one legislator in 1931 about the passage of Sec. 5-1124. The exhibits were rejected by the trial court after an objection of hearsay (Tr. 212). The exhibits were evidently offered to show legislative intent. In that role they are patently inadmissible because the expression of one legislator can have no bearing on legislative intent. They are inadmissible as double hearsay: hearsay on the part of the news reporter, hearsay on the part of the printer. The District Court properly rejected the exhibits.

4. *Standing to Sue:*

The District Court properly held that all parties have standing to bring this case.

In the case of Superintendent Leuthold there is a conflict of authority; intervenor-appellees rely on the *South Dakota* cases, supra. Appellants rely on *Jackson v. 1st National Bank of Valdosta,* 349 F.2d 71, (5th Cir. 1965). The District Court held that Leuthold had standing (R. 57).

In *Jackson v. 1st National Bank of Valdosta,* the Court of Appeals held that the Georgia Superintendent of Banks had standing to bring an action against a na-

tional bank to enjoin it from operating an illegal branch, reasoning, at 349 F.2d 75, that:

> ". . . . The subsumption of state substantive law as the regulating principle for national banking associations concerning branching carries with it the right of the State Superintendent of Banks to see to it that substantive law is enforced."

If the State of Montana, through its duly appointed Superintendent of Banks, is without standing to enforce its own laws on branching against national banks, the principle of competitive equality is destroyed. Leaving the enforcement of state laws on branching against national banks solely to the Comptroller of the Currency is patently insufficient to protect the congressional policy of equality between state and federal banks.

5. Civil Jurisdiction Under the Bank Holding Company Act:

Related to Superintendent Leuthold's standing to sue is Appellees' contention that the Bank Holding Company Act is a criminal act and that the propriety of the Comptroller's decisions as to holding company acquisitions cannot be tested in a civil suit.

It is true that the Bank Holding Company Act is criminal in nature in that it provides for a penalty for its violation, and that 12 U.S.C., Sec. 1848 provides that a party aggrieved by an order of the Board of Governors of the Federal Reserve may obtain a review in the U. S.

Court of Appeals. We point out, however, that the Federal Reserve Board did not, and does not, pass on consolidations such as this, so no review could be had in a Court of Appeals in a case such as this where only the Comptroller acts (see *South Dakota,* supra, 219 F. Supp. 842 at 853). It is the action of the Comptroller for which review was sought in the District Court in this case. His actions are clearly reviewable under 5 U.S.C., Sec. 702.[6]

6. *Competitive Effect:*

The Comptroller states in his statement of the case that no significant anti-competitive effect because of the consolidation and branching was noted by the Department of Justice, the Federal Reserve Board, and the Federal Deposit Insurance Corporation. Appellants note this statement only to point out that the competitive investigation made by those agencies has only to do with potential monopoly, (12 U.S.C., Sec. 1828(5)) and has nothing to do with the jurisdictional amount or injunction elements of this case.

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6 **Whitney National Bank v. Bank of New Orleans,** 379 U.S. 411, 85 S.Ct. 551 (1965) is not contrary. In **Whitney,** the Comptroller's action was sought to be reviewed under the Administrative Procedure Act. The Court held that since the Federal Reserve Board had acted, review was limited to that provided by the Bank Holding Company Act. The Court left the door open for a review of the Comptroller's action in a proper case: a case in which it was the only action that was taken. For other cases in which actions of the Comptroller have been reviewed under the Administrative Procedure Act, see **First National Bank of Smithfield v. Saxon,** 352 F.2d 267; **Peoples Bank of Trenton v. Saxon,** 244 F.Supp. 389; **Bank of Sussex County v. Saxon,** 251 F.Supp. 132; **American Bank & Trust Co. v. Saxon,** 373 F.2d 283.

II.

CONCLUSIONS

Much of the foregoing is necessary legal quibbling. It is the minutiae upon which cases sometimes turn. Once raised it cannot be ignored, out of fear that if ignored it will decide the case adversely. Appellants are confident that they are properly in court to test the action of the Comptroller under the National Bank Act, the Bank Holding Company Act, and the Administrative Procedures Act, and that they are correct in their legal interpretations of the statutes involved.

But the large issues in the case are whether the philosophy of competitive equality between national and state banks be preserved, and whether the philosophy underlying the Bank Holding Company Act (the prevention of undue concentration of banking and financial power)[7] be enforced. It seems to Appellants that these issues must be resolved in their favor.

It is no answer to the competitive equality problem to say that if this court allows branching in Montana for national banks, state banks will thereafter be able to meet the competition by branching. True, state banks would have the technical, legal ability to consolidate and branch, but they would not have the same eco-

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7 102 Cong. Rec. 6857 (1956).

nomic and geographic opportunities.[8] Outside holding companies have banks in every city of any consequence in Montana, and their counties of domicile touch nearly every county in Montana. If the District Court's decision is allowed to stand it will be geographically and economically possible for three out-of-state holding companies to control a substantial percentage of banking power in Montana. Myriad small country banks, both state and national, will have only two choices: to become a branch or to compete with a branch. And that will surely follow, as the night the day.

This is not a question of whether or not one favors branch banking. Montana is philosophically on record as opposing it. If the consequences of the District Court's decision are as we suggest (and in a case as important as this, that assumption must be made) then it cannot be said that the 1931 legislature intended to allow full scale branches after a consolidation. If that was its intent it would simply have repealed the non-branching statute.

This case involves three laws, each of which expresses something more than a regulation or a prohibition. Each expresses a policy, a philosophy. The case should not be judged on narrow questions of whether or

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8 It should be borne in mind that consolidation is possible only in the same or contiguous counties.

not a loop-hole has been successfully found and got through, on what one legislator said to another, or on one man's image of the legislature's image of banking.

It appears conclusive to Appellants that Montana is opposed to branch banking; that all future activities of bank holding companies have been confined by the Congress to their home states; and that when Congress imposed the rule of competitive equality it intended equality in fact and not form.

The District Court should not be reversed.

Respectfully submitted,

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CERTIFICATE

JOHN M. SCHILTZ, one of counsel for Appellants, states as follows:

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

JOHN M. SCHILTZ
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that Appellants' Reply Brief has been served by mailing three copies thereof to each of the following counsel of record in this cause: Moody L. Brickett, United States Attorney for the District of Montana, Federal Building, Butte, Montana 59701 and Stephen R. Felson, United States Department of Justice, Appellate Section, Civil Division, Washington, D. C., Attorneys for Appellee; and to McKeon and Brolin, 122-126 Oak Street, Anaconda, Montana 59711, Johnson & Johnson, 1st National Bank Building, Butte, Montana 59701, and John D. French, 1260 Northwestern Bank Building, Minneapolis, Minnesota 55402, Attorneys for Intervenor-Appellees.

Dated April ...., 1968.

....

JOHN M. SCHILTZ
One of Counsel for Appellants